

## ЗАРУБЕЖНОЕ ПРАВО

The Freedom of political speech in Perspective of  
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What is actually a hate speech, where are the boundaries between freedom of speech and expression that meets the hate attributes? The expansion of social media strengthens the sphere of public communication and gives every individual connected to these media an opportunity to express their opinion. The article deals with two cases of the European Court of Human Rights in perspective of political speech and its limitation. In our contribution, we also deal with the ethics and presentation of political expression in the context of the political reality of the Slovak environment, which guides the real struggle of a modern type of democracy. Its consequence is the fact that the political arena creates opportunities for thoughts that are offensive, extremist, offend and encourage hatred and discrimination. The question arises as to how to prevent them effectively in mass media if the representatives of such opinions are elected by the citizens themselves in the free elections and they are thus given the mandate to disseminate opinions which may be in principle criminal or justifiable criminal offenses. It also presents a basic newest grant for a research project "Freedom of speech in the context of modern technologies". We have joined our experts among the three faculties — law, psychology, and mass media of the Paneuropean University, Slovakia, to investigate what kind of boundaries are set for the content, false information, hate speech, lies and fictions, which is an extraordinary challenge of our research nowadays.

**Keywords:** judicature, freedom of speech, political speech, European Court of Human Rights, Convention on Human Rights, mass media, hate speech, Criminal Code, denying historical facts.

**1. Introduction.** What is actually a hate speech, where are the boundaries between freedom of speech and expression that meets the hate attributes? Fabio Marcelli, Research

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Director at the Institute for International Studies of the National Research Council of Italy (ISGI-CNR) said: “The expansion of social media strengthens the sphere of public communication and gives every individual connected to these media an opportunity to express their opinion. This undoubtedly represents an unprecedented chance to improve the quality of democratic participation and the free dissemination of ideas, but at the same time, it multiplies the threats to peaceful co-existence caused by hate speech. Hate speech is not part of freedom of expression but abuse of freedom of speech” (Marcelli 2018).

**2. Main text.** At the international level the first, we have a strong international tool and most important one, in art. 20, para. 2, of the International Covenant on Civil and Political Rights (ICPPR) of 1966, which establishes that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”<sup>1</sup>. This norm has to be read in connection with the limits to freedom of expression set by art. 19, para. 3, of the same Covenant, limits “necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (order public), or public health or morals”. The difference between the two norms is clearly explained by General Comment n. 34 by the Committee on Human Rights, which also contains an authoritative interpretation of art. 20<sup>2</sup>. Point 51 of that Comment is redacted in the following terms: “What distinguishes the acts addressed in article 20 from other acts that may also be subject to limitations, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19, such as Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. Freedom of expression is enshrined in Article 10 of the Convention on Human Rights and Fundamental freedom.

Article 4 of the Convention for the elimination of racial discrimination (CERD) reads as follows: “States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights”<sup>3</sup>.

Among the regional zone there is a following Recommendation (97)20 of the Council of Europe, 30 October 1997 — “the term ‘hate speech’ shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including:

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<sup>1</sup> International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. Accessed June 25, 2018. <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>2</sup> General comment No. 34 to Article 19, adopted by Human Rights Committee on 102<sup>nd</sup> session Geneva, Freedoms of opinion and expression, 11–29 July 2011, published 09/12/2011. Accessed June 25, 2018. <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

<sup>3</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19. Accessed June 25, 2018. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”<sup>4</sup>.

Another important development in the framework of Council of Europe is represented by the adoption, on 28 January 2003, of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems<sup>5</sup>.

Of course, the dangerous impact of this rhetoric is reinforced by social and geopolitical phenomena such as the economic crisis, unemployment, migration or environmental pollution that has terrible predictions. We will mention migration policy and hate speech in perspective of two cases, but let's see first what are the instruments and policy of the European Union the Council of Europe against the phenomenon of hate speech. The criminalisation of hate speech will depend on the characteristics of existing national legislation, which can differ. Nevertheless, states are bound, recurring certain conditions, to criminalise hate speech.

In parallel with the European Court of Human Rights<sup>6</sup> case law, as well as the Court of Justice<sup>7</sup> case law, the legislation in the European Union is reacting to hate speech in the virtual sphere by the measures which impose, really hard burdens, responsibilities and subsequent sanctions for the dissemination of such content, either through original expressions or comments or through further harvesting and spreading of hateful content. In respect to the growth of illegal content on the Internet, including online terrorist propaganda, xenophobic and racially motivated expressions of incitement to violence and hatred, online platforms are becoming increasingly important and must strengthen their social responsibility.

Among other things, it is worth mentioning The Council of Europe's Convention on Cybercrime, which entered into force in 2004 and serves as the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security. It also contains a series of powers and procedures such as the search of computer networks and interception<sup>8</sup>.

Its main objective, set out in the preamble, is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international co-operation. In other words, this treaty aims to complement existing cyberspace tools to streamline investigation and prosecution of a computer system and data crime and to collect evidence of criminal offense in electronic form.

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<sup>4</sup> Recommendation No. R (97) 20 of the Committee of Ministers to member states on “hate speech” adopted on 30 October 1997, Accessed June 25, 2018. [https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset\\_publisher/aDXmrol0vvsU/content/recommendation-no-r-97-20-of-the-committee-of-ministers-to-member-states-on-hate-speech-?inheritRedirect=false](https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-no-r-97-20-of-the-committee-of-ministers-to-member-states-on-hate-speech-?inheritRedirect=false).

<sup>5</sup> Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Treaty No. 189, Strasbourg, 28/01/2003. Accessed June 25, 2018. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189>.

<sup>6</sup> European Court of Human Rights, later referred to as an ECHR, for more information, see: [https://www.coe.int/t/democracy/migration/bodies/echr\\_en.asp](https://www.coe.int/t/democracy/migration/bodies/echr_en.asp).

<sup>7</sup> For more information, see the official website of the ECJ: [https://curia.europa.eu/jcms/jcms/j\\_6/en/](https://curia.europa.eu/jcms/jcms/j_6/en/).

<sup>8</sup> The Council of Europe's Convention on Cybercrime, Treaty no. 185. Accessed June 25, 2018. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185>.

In addition, Recommendations and Declarations of the Committee of Ministers of the Council of Europe in the field of media and information society<sup>9</sup> are also very important, with the special accent to Recommendation CM/Rec (2012)4 of the Committee of Ministers to member states on the protection of human rights with regard to social networking services<sup>10</sup>.

However, it will be interesting to follow developments in the world of the Internet, the electronic and social media, how it will be revealed, but, above all, to evaluate the manifestations as inappropriate criteria of the permissible limits of freedom of expression, and to remove from it any such contribution which may incite hatred, violence or propagation of the ideas of totalitarianism, denial or revisionism of historical events. Well, it's going to be a Sisyphus' plight for big companies like google or facebook, especially if we think it's an issue that goes far beyond the limits of the possibility of instantly recognizing potential hate speech. Some like to say that this might establish a kind of censorship of modern media.

It also requires to judge the very fragile boundaries defining freedom of expression within the free market of ideas and opinions, as far as this approach is largely determined by a certain historical or rather geopolitical experience.

Moreover, the current situation in the sphere of freedom of expression has a totally different connection from a historical perspective, if we compare Europe and the US: the First Amendment to the US Constitution, which says "Congress shall make no law abridging the freedom of speech or the press" (History.com Staff).

Coincidentally with freedom of speech, a judicial practice also addresses the area of protection of personal rights. In brief and in a simplified way, it can be said that the "clear and present danger" theory also appears in the philosophy of protecting the personality sphere, for example, the privacy of US politicians is practically lacking legal protection. Courts are not considered to be a forum for judging which facts of politics' life should be the subject of public discussion.

It could be said that even in this system the principle of the "market of ideas" is manifested, so it is left to the public to determine what will be the subject of discussion and what is at the edge of its interest. The outlined principle is further developed in the treatment of extremist expressions. While the majority of racist, fascist and other extreme expressions are legal in the United States, in Europe their legality is firmly in the hands of criminal codes, although there are differences in individual states as regards the formulation of criminal codes, the severity of punishments, and the coverage of certain types and forms of expressionism of extremism. Without going into the individual nuances of freedom of expression in the US and Europe, we can not overlook the recent development of history, especially the turning point not only for the US but also the entire civilized rest of the world brought on September 11, 2001. It has hit not only the sphere of

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<sup>9</sup> Recommendations and declarations of the Committee of Ministers of the Council of Europe in the field of media and information society. Media and Internet Division Directorate General of Human Rights and Rule of Law Strasbourg, July 2015, published 2016 by Council of Europe. Accessed June 25, 2018. <https://rm.coe.int/1680645b44>.

<sup>10</sup> Adopted by the Committee of Ministers on 4 April 2012 at the 1139<sup>th</sup> meeting of the Ministers' Deputies, in which Social networking providers should respect human rights and the rule of law and more than ever to make an effort to Protection of children and young people against harmful content and behaviour. Last but not least, there is the Recommendation of the Committee of Ministers of the Council of Europe on hate speech No. R (97) 20 of October 3, 1997.

the physical freedom of the individual, but also the sense of unshakable certainty of solid democratic foundations, which could not easily resist the wide opened and unhindered freedom of speech anymore.

In spite of this, Europe of these days faces a real threat of spreading hate speech. The word *sui generis* has got a strong power, and there is often a thin line from the word to the deed. It is particularly sensitive with regard to the immigration wave that divides both Europe's opinion and world politicians, but mainly sets a mirror of the level of tolerance and democracy of particular civil society.

**The first judgment, we want to deal with, among the case law of ECHR, more specifically the decision on Admissibility is the case of Le Pen v. France<sup>11</sup>, which evidences that the Freedom of political speech no justification for hate speech.**

Mr Jean-Marie Le Pen, the president of the French "National Front" party, was fined 10,000 euros for "incitement to discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion", on account of statements he had made about Muslims in France in an interview with *Le Monde* daily newspaper. The Paris Court of Appeal sentenced him to another fine, of the same amount, in 2008 after he commented on the initial fine, in the following terms, Again it was crucial to decide whether or not the conviction of Mr Le Pen was to be considered necessary in a democratic society, taking into account the importance of freedom of expression in the context of political debate in a democratic society. The Court reiterated that *freedom of expression applied not only to "information" or "ideas" that were favourably received but also to those that offended, shocked or disturbed. Furthermore, anyone who engaged in a debate on a matter of public interest could resort to a degree of exaggeration, or even provocation provided that they respected the reputation and rights of others. When the person concerned was an elected representative, like Mr Le Pen, who represented his voters, took up their concerns and defended their interests, the Court has to exercise the strictest supervision of this kind of interferences with freedom of expression.*

Le Pen's statements had been made in the context of general debate on the problems linked to the settlement and integration of immigrants in their host countries. The decision of 20 April 2010 in the case of *Le Pen v. France* is fully in line with the case law of the ECtHR not accepting 'hate speech' as part of public or political debate being protected under Article 10 of the European Convention on Human Rights (referred as "Convention" below)<sup>12</sup>. Mr Le Pen is even confronted with a kind of boomerang-effect of the Court's case law, as in an earlier case the Grand Chamber of the ECHR.

Yet in another case of **Féret v. Belgium** the European Court showed an analogue approach<sup>13</sup>. In this judgment the Court reiterated that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. To recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions. Therefore, according to the ECtHR, in the case of *Féret v. Belgium*, there had been a compelling social need to protect the rights of the immigrant community, as the Belgian

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<sup>11</sup> *Le Pen v. France*, decision adopted April 20, 2010, application no. 18788/09.

<sup>12</sup> For more informations see the official website: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>13</sup> *Féret v. Belgium*, a decision by July 16, 2009, application no.15615/07.

courts had done by convicting Mr Féret for incitement to hatred and discrimination. The Court thus found that there had been no violation of Article 10 ECHR (Voorhoof 2009).

Similarly, it was also the case in **Leroy v. France**<sup>14</sup>, where there was racial hatred, or i.a. in the decision on the inadmissibility of the **Glimmerveen and Hagenbeek v. The Netherlands**<sup>15</sup>, where it was the encouragement of the “white Dutch” addressed to everyone who is not white to leave the Netherlands. These views were judged by the Strasbourg Court to be an abusive right under the Convention (Article 17), thereby excluding from the protection of Article 10 of the Convention.

It would be interesting to evaluate this decision in times of changing social moods. It is to be expected that, that ECHR will remain on its judgment position without change over time, as it was established in the case of Féret that the penalty ban on the execution of a parliamentary mandate for ten years was appropriate to the legitimate aim against racial statements of political representative. Therefore, the court did not regard the complainant as a victim of a violation of the Convention, on the contrary, it considered that interference with his rights was appropriate in order to prevent riots and protect the rights of others.

It is clear from these two decisions that incitement to hatred does not necessarily call for an act of violence or other crime. Attacks to persons by insulting, ridiculing or defamation, as were in the mentioned cases, is enough for the authorities to give priority to combating racist expressions to freedom of expression, which is applied in an irresponsible manner, jeopardizing the dignity and security of these parts or groups of the population<sup>16</sup>. The Court does not deny that political parties have the right to publicly defend their views but should avoid defending racial discrimination and resorting to degrading words or attitudes<sup>17</sup>.

Nevertheless, although the definition of politically hate speech may be sufficiently general and certain, at the domestic level there are „voices“ calling for a change in legislation that hates speech in the level of criminal sanctions. A few days ago in the matter under the No. PL. ÚS 5/2017 a group of 30 representatives of the National Council of the Slovak Republic proposed to the Constitutional Court of the Slovak Republic a motion for a declaration of non-compliance with the provisions of § 421 para. 1 Criminal Code, because some of its parts related to crimes of extremism are contrary to the Constitution of the Slovak Republic. Thus, the issue may have a close impact on certain radical groups of political representatives of nationalist-oriented right-wing parties who do not care about hate speech and could be penalized in the broader wording of the Criminal Code on the basis of the Criminal Code amendment that tightened anti-extremism measures and came into force January 1, 2017. On the basis of this petition to initiate the procedure for the review of the constitutionality, however, the Constitutional Court found a contradiction with the Constitution in four provisions. It is, on the one hand, hate speech to “another group of people” and widespread criminality of hatred and incitement to hatred for political conviction.

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<sup>14</sup> Leroy v. France, a decision of October 2, 2008, application No. 36109/03.

<sup>15</sup> Glimmerveen and Hagenbeek v. The Netherlands, decision of October 11, 1979, application No. 8348/78 & 8406/78.

<sup>16</sup> Paragraph 73 of the judgment in Féret v. Belgium, cited above.

<sup>17</sup> Ibid. Paragraph 77.



The representatives of the parliament have read the wording about another group of people that it is a more indefinable group and therefore a vague and uncertain term. As Ivetta Macejkova, chairwoman of the ÚS, said, “the contested part of the provision is inconsistent with its openness to the principle of legality because the freedom of expression cannot be limited so indefinitely and the crime cannot be formulated so vaguely”. The decision of the Constitutional Court, according to the legal representative of the Opposition Group Daniel Lipšic, is a good report on the freedom of expression in Slovakia. He said that in the case of verbal expressions against “another group of people”, he did not know what speech he should avoid in order to potentially avoid criminal liability. He further noted that in a free society it is absurd that political controversy was the subject of criminal proceedings. “The basis of democracy is the debate, sometimes even polemical, sometimes even beyond the bounds of decency, but it must be regulated by society itself, not criminal law because that impact on the threat of freedom of expression is very great”, he said.

It is also to be noted that the purpose of suppressing defamatory and insulting statements is to maintain a certain degree of culture and tolerance in society and not to inflict an emotional pain or humiliation on groups of minorities or individuals to whom such speech is directed.

If the President of the Parliament frivolously mark his political opponent as a “gypsy little girl”<sup>18</sup>, regardless of whether or not she is a member of this ethnic group, it is definitely a picture of how far a hatred speech can reach if it is not “guarded” by possible punishment. It is not just about how far the politicians will be held responsible for their statements in and outside of Parliament, but the fact that, by banalizing the seriousness of this ironic and offensive speech, it can get sublimely into the culture of social expression as a norm, as something which is just common, that nothing happens and it is tolerated, which leads to fear and destabilization of the ideas of equality and dignity before the law. Toleration of this speech is a signal that being a member of the Roma community and possibly being a woman-the member of this community in top politics, is a less valuable than being a “white man” in the same or comparable career or social position.

It is, of course, a more complex sociological and political reasoning whether society is educated and critical at the same time enough to the extent that it does not identify itself with these defamatory and hateful statements. This is despite the fact that the threat of criminal repression has to act as an ultima ratio in democracy and the rule of law.

It is true that some countries, including the Slovak Republic, traditionally criminalize hate speech, but groups that are protected by such expression are defined on the basis of non-measurable (or at least relatively lasting) characters such as race, ethnicity and national origin, or sexual orientation. It is based on certain historical connotations, where the Slovak Republic, in the recent history of its Slovak state, has collaborated with Nazi Germany for a certain period of time. Moreover, for us and the rest of Europe and the rest of the world there is a constant threat, displacing historical facts, even denying them, the horrors of the WWII can be repeated in some form.

**New interesting applied research of the Faculty of Law of Paneuropean University in Bratislava.** We are delighted that in 2017 we managed to get a grant for a research project “Freedom of speech in the context of modern technologies”. We have joined our experts among the three faculties-law, psychology, and mass media of the Paneuropean

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<sup>18</sup> HNonline. Accessed June 25, 2018. <https://slovensko.hnonline.sk/1880745-nejaka-ciganocka-zo-sas-ky-si-na-mna-nebude-dovolovat-urazil-danko-nicholsonovu-sulikovci-hovorila-o-trestnom-cine>.

University, Slovakia, to investigate what kind of content, false information, hate speech, lies, fictions are already inadmissible, and what is the point or a limit to sanction them. It will be an interesting exploration from the point of view of the journalistic work and the psychological perspective that focuses on the recipient, who watches, listens, reads etc. We believe the result will be at least a partial contribution to the fight against hate speech. In this year we plan several internal workshops and Round tables, first one already in February 2019 in Vienna in cooperation with members of European Commission of European Union and invited guest from Slovakia and Austria with the aim to define fundamental objectives, define key terms of the project, i. e. — area of mass media law and its components, truths, fictions, lies, evaluating opinions, factual claims, etc., protection of the personality of physical person and protection of name and reputation of legal person, with the special focus on false and hate speech in media and legal tools to prevent it and to sanction among EU and world legal measures. Due to the nature of the research and the fact that it is implemented in social science such as law and mass media, we assume that the basic form of the dissemination of the results of the project will be ongoing publication of research results in the form of research papers to the journals and volumes by involved researchers in reviewed and non-reviewed national and international journals and volumes. First results of the research due to its relevance to the current area of their interest can be expected in the year 2016, research and publication will continue at least on the level stated in the lists of project outputs. At the same time during the project we will organize even in the first year-round tables for professionals and the wider public, where we invite lawyers working with the media, editors and journalists, publisher and online magazine publishers and other people who may with their experience contribute to the topic of the project and the popularization of research results. In addition to the round tables, we prepare the science conference with the participation of a broader range of scientific workers during the third year of the project. At the conference should be presented with more comprehensive outputs from research conducted by investigators. We consider the most important issue of extensive monography, which will disseminate the outcomes. The monography will enhance the popularization effect results in the period after the end of the project.

At the same time the spread and popularization of a topic will be realized by investigators teaching students who on the one hand will write thesis linked to the project topic, and on the other hand, they will give lectures and teaching courses at the Law Faculty of Mass Media Faculty at the Paneuropean University.

**3. Conclusion.** Because more than ever it is quite clear nowadays that if a democratic and legal state respecting basic human rights wishes to survive, it must effectively defend itself against persons and movements that want to destroy democracy, restrict fundamental rights by spreading hatred towards groups of people. It is the fragile balance which needs to be reached sensitively by detecting the difference between the legitimate debate in democratic society and the spread of extremist expressions which cannot be sheltered under the Freedom of Speech in this meaning.

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